Supreme Court, U. S.
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In The

Supreme Court of the United States

NO. 77-1015

RONALD PRATE, LEONARD LA ROSA, PATRICIA PLUMERI, PATRICIA A. DOYLE, THERESA YOUNG, TERRENCE P. ANDERSON, MICHAEL A. DI GIOVANNI, GARY GENNARINO, MICHAEL C. KELLER, CHARLES J. ZONA, JOSEPH P. TANTALO, MICHAEL PERRY, SAMUEL T. GERMANO, RONALD S. ZAVAGLIA, CAROL TSCHIDERER and THOMAS A. TSCHIDERER,

Petitioners,

vs.

ELISHA FREEDMAN, CITY MANAGER OF THE CITY OF ROCHESTER, NEW YORK; THOMAS HASTINGS, CHIEF OF POLICE OF THE CITY OF ROCHESTER POLICE DEPARTMENT; MEMBERS OF THE COUNTY OF MONROE CIVIL SERVICE COMMISSION; and EXECUTIVE DIRECTOR OF THE COUNTY OF MONROE CIVIL SERVICE COMMISSION,

Respondents,

vs.

JOHN HOWARD, JOHN WYCHE and JOHNNY SMITH,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents Elisha Freedman and Thomas Hastings submit this brief in opposition to petitioners' request that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on October 20, 1977.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Second Circuit, entered on October 20, 1977, affirmed the dismissal of the complaint by the United States District Court for the Western District of New York. The judgment of the United States Court of Appeals for the Second Circuit is attached to the Petition as Appendix D. The decision of the United States District Court for the Western District of New York is attached to the Petition as Appendix C and is reported at 430 F.Supp. 1373 (W.D.N.Y. 1977).

QUESTIONS PRESENTED

1. Whether a temporary, remedial hiring quota required by a Consent Decree is lawful and proper or an unlawful act of discrimination against petitioners.
2. Whether the Second Circuit's judgment on the merits of petitioners' claims is consistent with the decisions of other Courts of Appeal.
3. Whether the Second Circuit's judgment is consistent with this Court's decision in Washington v. Davis.

STATEMENT OF THE CASE

On September 17, 1976, petitioners instituted these consolidated actions seeking to invalidate a final Order and Judgment of Honorable Harold P. Burke, dated May 12, 1975, in a lawsuit entitled "John E. Howard, et al v. Elisha Freedman, et al., 74 Civ. 234 (W.D.N.Y.).

Prior to the commencement of the present lawsuit, on June 18, 1976, a number of individuals, including 14 of the16 petitioners in the present action, sought to intervene and reopen the Howard case on the ground that that Order discriminated against nonminority applicants for the Rochester Police Department. After hearing oral argument, the District Court denied the application for intervention. Howard v. Freedman, 74 Civ. 234 (W.D.N.Y. June 22, 1976). The applicants for intervention filed a notice of appeal from the order denying intervention, but subse-

quently stipulated to dismissal of the appeal.

The petitioners then filed the instant actions seeking to accomplish the identical result, i.e., the invalidation of the final Order and Judgment in Howard. Petitioners moved for preliminary relief asserting, as they did in their unsuccessful intervention application, that the relief mandated by the Howard decree violates the Constitution and various Civil Rights Acts. On October 20, 1976, the District Court denied petitioners' motion for a preliminary injunction. Subsequently, by decision and order, dated May 3, 1977, the Honorable John T. Curtin dismissed petitioners' complaint. 430 F.Supp. 1373. In so doing, the Court held that petitioners' challenge to the Howard order constitutes an impermissable collateral attack on a prior final judgment. Moreover, the Court held that even assuming petitioners could collaterally attack

the Order in Howard, their complaints fail to state a claim upon which relief may be granted in that the final order in Howard was entered in full conformity with both federal law and the District Court's power to remedy the effects of past discrimination against members of minority groups.

Petitioners appealed from the Order dismissing their complaints and, on October 20, 1977, the United States Court of Appeals for the Second Circuit affirmed without opinion.

Petitioners then filed the instant petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

REASONS FOR DENYING THE PETITION

I

THE TEMPORARY, REMEDIAL HIRING MECHANISMS REQUIRED BY THE HOWARD ORDER AND JUDGMENT ARE LAWFUL AND PROPER, AND SUCH PROCEDURES CANNOT BE DEEMED TO UNLAWFULLY DISCRIMINATE AGAINST PETITIONERS

The petitioners instituted these actions seeking compensatory and injunctive relief against the government respondents for alleged unlawful discrimination in the recruiting, testing and hiring for the position of Police Officer in the City of Rochester, New York. The actions of the government respondents of which the petitioners complain were taken pursuant to and in compliance with a final order and judgment in a lawsuit entitled "John E. Howard, et al. v. Elisha Freedman, et al.", 74 Civ. 234 (W.D.N.Y. May 12, 1975).

The original Howard litigation was brought by the present intervenors-respondents — John Howard, John Wyche and Johnny Smith — against the same government officials who are now respondents in

the present matter. Petitioners correctly point out, at page 1 of their reply to intervenors-respondents' brief in opposition to petition for writ of certiorari, that the original Howard lawsuit was brought pursuant to several causes of action, including TitleVII of the Civil Rights Act of 1964, as amended (42 U.S.C. §§2000e, et seq.). However, the implications of petitioners' argument, that it is, therefore, improper to refer to Howard as a Title VII case does not bear close scrutiny. On June 27, 1977, this Court decided Dothard v. Rawlinson, _____U.S._____, 97 S.Ct. ____, 53 L.Ed.2d 786, a Title VII case despite the fact that the underlying complaint posed several causes of action. Certainly the original Howard plaintiffs were not required to meet the standards of proof under each cause of action in order to prevail; it was sufficient that they prevail under any of the causes of action. Significantly, at all times since the

commencement of the present actions, the Howard suit has been considered an action under Title VII. Prate v. Freedman, 430 F.Supp. 1373 (W.D.N.Y. 1977).

The original Howard lawsuit did not go to trial. On the day the trial was scheduled to begin, the parties agreed upon terms of settlement. Following a hearing held pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, the District Court entered an order and judgment incorporating the terms of the stipulated settlement. Petitioners contend that a fact finding hearing should have been conducted by the District Court. This is not the rule in Title VII cases where public policy strongly favors voluntary compliance and settlement. Patterson v. Newspaper Deliverers' Union, 514 F.2d 767 (2d Cir. 1975); United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826 (5th Cir. 1975); Cotton v. Hinton, 559 F.2d 1326 (5th Cir. 1977).

Although Howard did not proceed to trial, it did involve extensive discovery. Based on the extensive pre-trial discovery, the parties stipulated to settle the Title VII claims. In doing so the parties acted in good faith and, significantly, petitioners do not now allege the contrary. Nor do petitioners allege that the trial judge in Howard abused his discretion in approving the consent decree. The Howard case was dissimilar from the situation confronting the trial judge in the recent case of United States v. City of Alexandria, ____F.Supp. ____, 16 FEP Cases 930 (E.D.La. July 22, 1977). Although the latter case was not concerned with the precise issue of the adequacy of discovery, the trial judge refused to approve a partial consent decree on the ground that "no past discriminatory conduct has been proved, stipulated, or agreed to" and, in fact, "such past discrimination is specifically

and vigorously denied by the defendants." Id., 16 FEP Cases at 931. To the contrary, the consent decree in Howard specifically found and made reference to, as was stipulated by the parties, a "racially disproportionate impact of prior employment practices." (Petition at B-8). The power and authority of the trial judge in Howard to enter a consent decree, under the facts before the judge, cannot be disputed. Cotton v. Hinton, supra.

In Title VII cases it is axiomatic that the remedy must be sufficiently broad in scope to eliminate not only the unlawful discriminatory practices themselves, but also any disparate impact resulting from such practices. The powers of a district court to fashion an appropriate remedy is well established. As this Court has stated: "Where racial discrimination is concerned, 'the [district] court has not merely the power but the duty to render a decree which will so far

as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future'". Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975). See also, Franks v. Bowman Transportation Co., 424 U.S. 747, 770 (1976).

Among the kinds of relief which may be granted by a district court is the imposition of a temporary employment quota, not to attain racial balance in the work force but to connect past discriminatory practices. While this court has not yet approved the use of a quota remedy to overcome employment discrimination, to date eight of the circuit courts of appeal have. Weber v. Kaiser Aluminum & Chemical Corp., 563 F2d. 216 (5th Cir. 1977); Davis v. County of Los Angeles, _____F.2d _____, 16 FEP Case 396 (9th Cir. Dec. 14, 1977). See, also, Point II, infra.

Plainly, preferential treatment on the basis

of race or national origin of the type set forth in the Howard order is not per se unlawful. On the contrary, such relief is not only lawful, it is required by Title VII to correct the continuing impact of past discriminatory employment practices. That granting affirmative relief to an injured class in a Title VII case may have an inherent adverse impact on others has been recognized by this Court. However, in Franks v. Bowman Transportation Co., supra, the Court, when confronted with the argument that retroactive seniority should not be granted to a class of discriminatees because to do so would conflict with the economic interests of other employees, rejected the argument primarily on the ground that to so limit the relief available to victims of discrimination for that reason would "frustrate the central 'make-whole' objective of Title VII". Id., at 773-74.

As in Franks, the remedy incorporated into the Howard Consent Decree was lawful and appropri-

ate under Title VII. Likewise, for the reasons set forth in Franks, individuals other than those within the class of plaintiffs are not themselves the victims of "reverse discrimination" or of any legally cognizable discrimination whatsoever. A remedy, lawful in itself, cannot at the same time be lawful.

Nor does the fact that the class to which Howard gave relief is identified in racial and national origin terms give rise to a constitutional cause of action under Washington v. Davis, 426 U.S. 229 (1976). To state a constitutional claim under Washington, it must be established that the challenged hiring practices are the product of "an invidious discriminatory purpose". Id. at 242. Since the hiring procedures of the Rochester Police Department are in compliance with a federal court order, the government respondents can hardly be said to be acting for a discriminatory purpose, much less an invidious discriminatory purpose, toward the petitioners.

II

THERE IS NO CONFLICT AMONG THE CIRCUITS AS TO THE AVAILABILITY OF A TEMPORARY REMEDIAL HIRING QUOTA IN CASES OF PAST EMPLOYMENT DISCRIMINATION

Petitioners continue to assert in this Court that there is a conflict among the circuits regarding the type of temporary remedial hiring quota relief granted by the District Court in the Howard consent decree. Petitioners' contentions on this point were properly rejected by the District Court and the Court of Appeals. The limited remedial relief granted by the Howard consent decree was a proper method for remedying the continuing effects of past discrimination against black and other non-white applicants for police positions. Such relief violates neither the Constitution nor statutory provisions. The Howard consent decree is in complete accord with the other decisions in the Second

Circuit. In United States v. Wood, Wire and Metal Lathers International Union, Local 46, 471 F.2d 408 (2d Cir.), cert. denied, 412 U.S. 939 (1973), the Second Circuit approved a similar quota for the issuance of construction work permits. Such a quota was ordered by an administrator who was implementing a consent decree entered by the District Court. As in the Howard case, the consent decree was entered pursuant to a settlement agreement subsequent to discovery but prior to trial. While quotas merely to attain racial balance are forbidden, quotas to correct past discriminatory practices are not. The District Court has the power and the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future. Louisiana v. United States, 380 U.S. 145, 154 (1965). It is clear from the Howard

order that the quota established therein was designed as a temporary mechanism to correct past discriminatory practices:

> The hiring mechanism set forth in paragraphs 2 and 3 is a temporary measure pursuant to federal law to remedy the racially disproportionate impact of prior employment practices. (Petition at B-8).

The Second Circuit and all other circuits which have ruled on the legality of a temporary hiring quota for use in remedying past discrimination have been unanimous in upholding the power of a district court to impose such a remedy. Boston Chapter NAACP, Inc. v. Beecher, 504 F.2d 1017 (1st Cir. 1974), cert. denied 421 U.S. 910 (1975); Rios v. Enterprise Association Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974); Vulcan Society v. Civil Service Commission, 490 F.2d 387 (2d Cir. 1973); E.E.O.C. v. American Telephone and Telegraph Company, 556 F.2d 167 (3rd Cir. 1977); Weber v. Kaiser Aluminum and Chemical Corporation, 563 F.2d 216 (5th Cir. 1977); United States v. Local

212, IBEW, 472 F.2d 634 (6th Cir. 1973); Crockett v. Green, 534 F.2d 715 (7th Cir. 1976); Carter v. Gallagher, 452 F.2d 315 (8th Cir.) (en banc), cert. denied, 406 U.S. 950 (1972); Davis v. County of Los Angeles, _____F.2d _____, 16 FEP Cases 396 (9th Cir. Dec. 14, 1977).

Accordingly, the District Court and the Court of Appeals acted properly and in full conformity with decisions by the other circuits in approving the temporary remedial hiring quota in the Howard consent decree.

III

THE DECISION IN WASHINGTON V. DAVIS HAS NO IMPACT UPON THE VALIDITY OF THE HIRING PROCEDURES REQUIRED BY THE HOWARD CONSENT DECREE

Petitioners have argued below and continue to assert in the Court that the decision of this Court in Washington v. Davis, 426 U.S. 229 (1976), has undermined the continued validity of the consent decree entered in Howard order. However, even if this Court had changed the law governing Howard, petitioners do not have the right to re-open and relitigate the Howard case at this time. Petitioners had the opportunity to make a timely intervention in the Howard case and could have litigated any points at that time. The District Court and the Court of Appeals rightly decided that the Howard case should not be reopened.

The complaint in the Howard case was based upon several grounds, including the Constitution,

42 U.S.C. 1981, and Title VII of the Civil Rights Act of 1964, as amended. This Court's decision in Washington discusses only the constitutional standard for adjudication of employment discrimination cases and does not apply to cases which were brought under Title VII. This Court stated explicitly in Washington that the constitutional standards differ from Title VII:

> As the Court of Appeals understood Title VII, employees or applicants proceeding under it need not concern themselves with the employer's possibly discriminatory purpose but instead may focus solely on the racially differential impact of the challenged hiring or promotion practices. This is not the constitutional rule. We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today. Id, 426 U.S. at 238-239.

This Court's statement in Washington that the constitutional standards differ from Title VII does not undermine the Howard consent decree. The Title VII basis of the Howard decree remains intact after the Washington decision. The standard

which governed the Howard case was, and remains, the standard adopted by this court in Griggs v. Duke Power Company, 401 U.S. 424 (1971). This court has followed the standards set forth in the Griggs case in deciding Title VII employment discrimination cases subsequent to Washington. In the case of Dothard v. Rawlinson, ____ U.S. _____, 53 L.Ed.2d 786 (1977), this Court stated that the standards set forth in Griggs and in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) were controlling in an employment discrimination case which did not involve an assertion of purposeful discriminatory motive. This court also reiterated in International Brotherhood of of Teamsters v. United States, 431 U.S. 324 (1977), that a prima facie Title VII violation may be established by policies or practices that are neutral on their face and intent but that nonetheless discriminate in effect against a particular group. In reemphasizing this point, this Court

cited Griggs, Albemarle and Washington with approval, thereby indicating that the standards set forth in Griggs survived the decision in Washington. 431 U.S. 324 at _____, 52 L.Ed.2d 396 at 423.

The lower courts interpreting Washington have also been consistent in deciding that the Griggs standards are still applicable to Title VII cases. In Davis v. County of Los Angeles, _____ F.2d _____, 16 FEP Cases 396 (9th Cir. Dec. 14, 1977), the court decided that the Griggs Title VII standards remain intact after this Court's decision in Washington. Similar decisions have been reached by other circuits. Kinsey v. First Regional Securities, Inc, _____F.2d____, 14 FEP Cases 1143 (D.C. Cir. April 18, 1977); United States v. City of Chicago, ____F.2d_____, 16 FEP Cases 908 (7th Cir. February 21, 1978).

Petitioners therefore have no basis for their contention that the Washington decision has undermined the Howard consent decree.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that exercise of the Court's discretionary power of review is inappropriate in these circumstances. Moreover, the judgment of the Second Circuit is in full conformity with decisions by this Court and by other Courts of Appeals. Accordingly, the Petition for Writ of Certiorari should be denied.

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April 11, 1978

Respectfully Submitted,

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